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No. 963

In the Supreme Court of the United States

OCTOBER TERM, 1960

ANGELIKA L. SCHNEIDER, PETITIONER

v.

DEAN RUSK, SECRETARY OF STATE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINION BELOW

No opinion has been rendered by the court of appeals in this case since it is now pending in that court on appeal.

JURISDICTION

The jurisdiction of this Court to grant certiorari before judgment in the court of appeals is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the issues in this case (primarily the constitutionality of the statute providing for loss of nationality by a naturalized alien residing abroad in his native country) are sufficiently similar to the issues involved in *Rusk* v. *Cort,* No. 567, this Term,

presenting the constitutionality of the statute providing for loss of nationality for remaining abroad to avoid military service, to warrant certiorari before judgment in the court of appeals.

STATUTE INVOLVED

Section 352(a)(1) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 269, provides:

> SEC. 352. (a) A person who has become a national by naturalization shall lose his nationality by—
>
> (1) having a continuous residence for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, except as provided in section 353 of this title, whether such residence commenced before or after the effective date of this Act;
>
> * * * * * *

STATEMENT

This case is now pending in the Court of Appeals for the District of Columbia Circuit on petitioner's appeal from the judgment of the District Court for the District of Columbia, affirming the determination of the Secretary of State that petitioner had lost her American citizenship under Section 352(a)(1) of the Immigration and Nationality Act of 1952, *supra*, by having a continuous residence of three years in the territory of a foreign state of which she was formerly a national, and holding that Section 352(a)(1) is constitutional (R. 24). Also before the court of appeals is the government's cross-appeal from the order of the district court that it had juris-

diction to entertain petitioner's suit for declaratory relief (see *infra*, pp. 4, 7–8). Petitioner seeks certiorari before judgment in that court.

1. Petitioner who was born in Germany on May 28, 1934, came to the United States with her parents in April 1939. On December 4, 1950, she acquired American citizenship through the naturalization of of her parents. In 1956, she married a German citizen and has since resided in Germany with her husband (R. 2–3, 16–17).[1] In administrative proceedings which were concluded in January 1960, petitioner was denied an extension of her United States passport and was found to have lost her United States nationality under Section 352(a)(1) of the Immigration and Nationality Act (R. 3–4, 12A–12C, 17–19).

2. On February 1, 1960, petitioner filed suit against the Secretary of State in the District Court for the District of Columbia seeking declaratory and injunctive relief. In her complaint she alleged, *inter alia*, that Section 352(a)(1), in that it applied only to naturalized American citizens and not to citizens by birth, is grossly discriminatory and violates the due process clause of the Fifth Amendment (R. 1–5).[2]

---

[1] Except that during September and October 1957 she made a six-week visit to the United States (R. 10, 16).

[2] On April 15, 1960, petitioner filed an application for the convening of a three-judge court under 28 U.S.C. 2282, 2284 (R. 13). On July 19, 1960, after a hearing, this application was denied by District Judge Matthews (R. 14–15). A subsequent application to Judge Fahy, as Acting Chief Judge of the Circuit, to convene such a three-judge court was denied. See *Schneider* v. *Herter*, 283 F. 2d 368 (C.A.D.C.).

The Secretary of State, in a motion to dismiss (R. 6) and an answer (R. 20–21), asserted, among other things, that the district court was without jurisdiction to entertain the declaratory judgment action because Section 360 of the Immigration and Nationality Act of 1952 provides the exclusive remedy for one residing abroad who claims a denial of citizenship rights, and that Section 352(a)(1) is constitutional. The district court held that it had jurisdiction of the declaratory judgment suit (R. 14–15) but granted the Secretary's motion for judgment on the pleadings on the ground that Section 352(a)(1) is a constitutional exercise of Congressional power (R. 24).

3. Petitioner noted an appeal from this judgment (C.A. No. 15,959), and the Secretary of State filed a cross-appeal from the order of the district court denying the motion to dismiss for lack of jurisdiction (C.A. No. 16,002).

After the filing of briefs and oral argument, the court of appeals, on March 24, 1961, *sua sponte* issued an order postponing its decision on these appeals until after this Court had decided *Herter* v. *Cort*, No. 567, 365 U.S. 808 (R. 25; Pet. App. B 2a). On April 25, 1961, the court of appeals denied petitioner's motion to vacate its March 24th order and promptly decide the case, or, in the alternative, to certify the cause to this Court under 28 U.S.C. 1254(3) (R. 26; Pet. App. B 3a).

ARGUMENT

Asserting that this case raises constitutional issues closely intertwined with those before this Court in

Rusk v. *Cort*, No. 567, and *Kennedy* v. *Mendoza-Martinez*, No. 566, petitioner urges the Court to adopt the unusual procedure of granting certiorari in this case while it is pending on appeal in the court of appeals. It is the government's view that no persuasive reasons have been advanced which would justify such a "deviation from normal appellate processes." Rule 20 of the Revised Rules of this Court.

1. The constitutional question in this case and the one raised in *Cort* (and *Mendoza-Martinez*) are similar only in a broad generic sense. While both *Cort* and this case posit, as the ultimate issue, the constitutional power of Congress to adopt expatriation legislation, the two cases concern separate and discrete exercises of that power. Each case involves a distinct statutory provision, different operative facts, and different constitutional considerations.

In the *Cort* case the crucial inquiry is whether Congress has the power to provide, as it did in Section 349(a)(10) of the Immigration and Nationality Act of 1952, for the expatriation of a native-born citizen who, in time of national emergency, remains outside the United States to evade or avoid service in the armed forces of the United States. This statutory provision stems initially from a Civil War statute, and its immediate predecessor was adopted in 1944 to meet a need that had arisen after the institution of the draft in World War II (see Brief for Appellants in *Mackey* v. *Mendoza-Martinez*, No. 29, O.T. 1959, pp. 16–19). It is aimed at those who, during periods of war or emergency, absent themselves from

the territorial jurisdiction of this country to avoid their military obligations; the validity of the provision raises important and difficult questions concerning the extent of the congressional power over an American national (whether naturalized or native-born) who has refused to perform a cardinal duty of citizenship, has immunized himself from sanctions for such failure by remaining without the territorial confines of the United States, and has sought refuge within the jurisdiction of another country. The constitutionality of this provision is supported, in our view, not only by the foreign affairs power of Congress, but also under the war power and the inherent right of a sovereign state to divest citizenship from one who rejects a paramount duty of such status.

The instant case, on the other hand, involves a wholly different statutory provision. Petitioner lost her citizenship under Section 352(a)(1) of the 1952 Act, *supra*, p. 2, for having a continuous residence for three years in the territory of a foreign country (Germany) of which she was formerly a national. This section of the 1952 Act stems from Section 404(a) of the Nationality Act of 1940, 54 Stat. 1137, 1170,[3] its aim being to "lessen friction with foreign governments growing out of disputes as to the nationality of our naturalized citizens and their offspring residing for

[3] Section 2 of the Expatriation Act of 1907, 34 Stat. 1228, had provided, in part, that a naturalized citizen who shall have resided for two years in the foreign state from which he came should be presumed to have lost American citizenship. This presumption was rebuttable.

prolonged periods in foreign lands." *Lapides* v. *Clark*, 176 F. 2d 619, 621 (C.A.D.C.), certiorari denied, 338 U.S. 860 (upholding the constitutionality of Section 404(c) of the Nationality Act of 1940, which provided for the expatriation of a naturalized citizen who resided continuously for five years in a foreign state other than that of his origin or former nationality). Unlike the statutory provision in *Cort*, Section 352(a)(1) affects only naturalized citizens, rests almost exclusively on the foreign affairs power, and finds its major challenge in the argument that it improperly discriminates between naturalized and native-born citizens. See *Lapides* v. *Clark*, *supra*. In short, to consider this case with *Cort* on the constitutional question would, we believe, inject new and difficult issues better left to separate study and consideration as well as to initial canvassing by the court of appeals, instead of clarifying and illuminating the question already posed in *Cort*.

2. The procedural issue posed in the *Cort* case is also present in this case—whether a person outside the United States can bring a declaratory judgment action to declare his nationality, or whether his exclusive remedy is under Section 360 of the Immigration and Nationality Act of 1952. However, we do not believe that it is a sufficient basis for joint consideration of the two cases. Petitioner's interest in the resolution of the procedural issue would be fully served by permitting her to file a brief as *amicus curiae* in the *Cort* case on this procedural question. In this way petitioner would be afforded an opportunity to present her views and thereby assist the

Court in its analysis of the common question, without requiring the Court, at this intermediate stage, to grapple with the separate constitutional question.*

CONCLUSION

For the foregoing reasons we respectfully submit that the petition for a writ of certiorari should be denied.

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*It should also be pointed out that there is now pending in the Court of Appeals for the District of Columbia, also awaiting the outcome of *Cort*, the companion case of *Herter* v. *Guerrieri*, C.A. No. 16,122. In that case the appellee has instituted a declaratory judgment suit claiming that she had been denied rights of American citizenship under Section 352(a)(2) of the 1952 Act, which provides for loss of nationality where a naturalized citizen has a continuous 5-year residence in a foreign state other than his place of origin or nationality. The district court, finding that the government had failed to establish by clear, convincing and unequivocal evidence that Mrs. Guerrieri's two visits to this country during the 5-year period had not broken the continuity of her residence abroad, held that she was an American citizen. It also found that it had jurisdiction to entertain the suit for declaratory relief. *Guerrieri* v. *Herter*, 186 F. Supp. 588 (D.D.C.). While petitioner does not assert that there are any facts here, as in *Guerrieri*, which would remove her from the operation of Section 352(a)(1), she did, in her reply brief in the court of appeals, advert to the factual findings in *Guerrieri* and noted that her 1957 visit to this country was "substantially equivalent in duration" (see Appellant's Reply Brief in C.A. No. 15,959, p. 13).

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ANGELIKA L. SCHNEIDER, *Petitioner,*

v.

DEAN RUSK, individually, and as SECRETARY OF STATE, *Respondent.*

REPLY TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

1. Respondent does not challenge that the constitutional issue presented by this case is important and should be decided by this Court.

2. Respondent admits that the same issue—the extent of the foreign affairs power as a justification for deprivation of citizenship—is present in this case as well as in *Rusk* v. *Cort*, No. 567, October Term, 1960 and *Kennedy* v. *Mendoza-Martinez*, No. 566, October Term, 1960 where this Court has already granted certiorari.[1] It is clear that this is the central common

[1] The distinction sought to be raised, that the present case involved a statute designed to "lessen friction with two governments . . . ." should be properly compared with respondent's jurisdictional statement in *Cort* and its brief in *Mendoza* which state that the statute there is designed to avoid "international complications".

issue in all these cases and that the same principles governing the limitations on the foreign affairs power must be applied in each.[2] The Court, therefore, we submit, would be assisted by a joint consideration of these cases.

3. It is also argued as a distinction between this case and the *Cort* and *Mendoza* cases that here the additional issue of discrimination between native born and naturalized citizens is present. This does not, of course, minimize the desirability of joint consideration of these cases and their closely similar issues.

4. In any event the issue is clear, the record complete, and the case ready for decision. It is submitted that the issue is an important one requiring decision by this Court and that it should not be delayed, with unfortunate consequences to petitioner and many others in a similar situation, merely to await a Court of Appeals decision on a constitutional issue which bears no promise of being of assistance to this Court.

The petition should be granted now so that this case may be set for argument together with *Cort* and *Mendoza* early in the October 1961 Term.

Respectfully submitted,

MILTON V. FREEMAN

June 13, 1961

[2] The Government suggests that the war power and what is referred to as the "inherent right of a sovereign state to divest citizenship" are also involved in the cases before the Court. In the light of *Trop* v. *Dulles*, 365 U.S. 80 (1958), it may be doubted what serious support the statutes involved in *Cort* and *Mendoza* can obtain from these contentions.